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self to be publicly represented as a general partner and this, under section 15016, would make him liable to plaintiff for the induced debt regardless of whether defendant was a limited partner or a general partner. This would seem to make the question of defendant's good faith compliance with the escape clause academic and not determinative of defendant's liability in this case.[15]

Regardless of the validity of the court's treatment of the good faith question, it clearly appears that misrepresentation is also a valid basis for establishing defendant's liability in this case under section 15016. The effect of this court's oversight in not applying section 15016, or discussing it, casts some doubt upon the overall validity of its opinion, and reduces the strength of this interpretation of the escape clause.

On the other hand, the court's relative silence on the misrepresentation and its preoccupation with the good faith requirement may just be its way of emphasizing the point already discussed; *viz.*, that the creditor's attorney may elect to base defendant's liability upon the grounds of full partnership because of a lack of good faith compliance with the escape clause, rather than upon grounds of misrepresentation.

Whether the court in *Wattenbarger* overlooked the misrepresentation grounds, or was merely emphasizing the good faith ground in addition to it, is a matter for some conjecture. One can only speculate as to the answer and as to the future influence of this case in the creditor's rights field.

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[15] The escape clause is only effective providing that no creditors had been misled, to their loss, by any misrepresentation to which he (the defendant) was a party. Annot., 18 A.L.R. 2d 1360, 1361 (1950).

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IN RE McINTYRE'S ESTATE: A NEW LIMITATION ON THE STATUTORY HOMESTEAD EXEMPTION?

A new limitation upon the right of a statutory homestead owner to make a testamentary disposition of his homestead property free from the claims of general creditors has been announced in a recent California court decision, *In Re McIntyre's Estate.*[1]

In *McIntyre* the homestead owner, an elderly woman, died without spouse or minor children. Her holographic will directed the executor to sell the property and distribute the proceeds, along with the residue of her estate, to certain legatees, none of whom were the decedent's heirs at law.

During the course of administration, three claims totaling $2000 were filed against the estate by the testator's general creditors, all of which were duly approved by the probate court. After the payment of the costs of administration and other preferred claims, the court then ordered the executor to distribute the proceeds from the sale of the property (which constituted the residue of the estate) to the legatees named in the will. No provision was made for the payment of the claims filed by the general creditors, the court apparently acting

[1] 189 Cal. App. 2d 498, 11 Cal. Rptr. 733 (1961).

under the belief that the proceeds were entitled to the exemption contained in section 1265 of the California Civil Code.[2]

An appeal was taken to the District Court of Appeal where the lower court's order was modified and the case remanded for payment of the contested claims. In so doing the upper court rejected the respondent's argument that the proceeds from the sale of the homestead property, in pursuance to the instruction in the will, were entitled to the protection of section 1265.

Narrowly construing the language of the statute, the court said that the exemption attaches only to " 'it' and its 'products, rents, issues or profits.' . . . 'It' clearly refers only to the homestead property, i.e., the dwelling house, together with the outbuildings, and the land on which the same are situated."[3]

When a will directs the conversion of real property into money, such property and all of its proceeds must be deemed personal property from the time of the testator's death.[4] As personal property the proceeds were not "products, rents, issues or profits" and therefore were not entitled to the exemption contained in the statute.

The court also summarily rejected the respondent's contentions that the proceeds were exempt from creditor's claims under a provision of section 1265 which entitles the homestead owner to sell his property and hold the proceeds from the sale under the protection of the exemption for six months. Again placing a narrow construction upon the language of the statute, the court held that this provision is applicable only when the homestead owner himself sells

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[2] Section 1265 of the California Civil Code sets forth the exemption: "[U]pon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign same for a limited period to the family of the decedent; *but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title. . . .*" [Emphasis added.]

Despite the mass of litigation concerning other features of this section of the code, the provision for non-liability upon devise of the property, or other means of testamentary disposition, has seldom been examined by the courts. Three cases seem to comprise the bulk of litigation on this point, laying down the following general propositions: (1) Homestead property can be devised free from the claims of the testator's general creditors. Estate of Fath, 132 Cal. 609, 64 Pac. 995 (1901). (2) Homestead property can pass by intestacy to the heirs of the decedent free from the claims of the general creditors. Estate of Muntz, 69 Cal. App. 404, 231 Pac. 371 (1924). (3) The heirs need not be minor children, or a surviving spouse to claim protection of the exemption when the property passes by devise or intestacy. (4) When it is necessary for the court to order an executor's sale of the property to pay costs of administration and other preferred claims, the heirs do not lose their privilege to assert the homestead exemption to defeat the claims of the general creditors. Estate of Izedorio, 100 Cal. App. 469, 280 Pac. 171 (1929).

In those works where legal authorities have touched upon this subject there seems to be a tacit assumption that section 1265 permits the homestead owner, who dies without surviving spouse or minor children, to make a testamentary disposition of the property by any means which he should choose without forfeiting the protection of the statute. 25 CAL. JUR. 2d, *Homesteads* § 88 (1954).

[3] 189 Cal. App. 2d at 500, 11 Cal. Rptr. at 735. The court relied upon section 1237 of the Civil Code which states: "The homestead consists of the dwelling house in which the claimant resides, together with the outbuildings, and the land on which the same are situated. . . ."

[4] CAL. PROB. CODE § 124.

the property and holds the proceeds, and not when he directs an executor to do so:[5]

> No logical reasons appear to support the view that although the proceeds are exempt from the claims of the general creditors for only six months while in the hands of the homestead owner, for whose benefit and those of his or her family the law is solely intended, . . . such proceeds are nevertheless exempt from creditors' claims for all time when bequeathed to strangers.

McIntyre may be regarded as a decision of first impression in California. In *Estates of Fath,*[6] *Muntz,*[7] and *Izedorio,*[8] the contested homestead property had passed by devise or intestacy. The *Izedorio* decision bears the closest resemblance to *McIntyre.* In that case the administrator was forced to sell the homestead property to pay costs of administration and other preferred claims. The general creditors then sought to reach the remaining proceeds contending, among other things, that once the property was converted into money by the administrator's sale, the exemption no longer applied. The courts in both *McIntyre* and *Izedorio* distinguished this from a testamentarily directed sale on the ground that in *Izedorio,* upon the death of the homestead owner, the property has passed immediately to the heirs, subject to the probate court's power to order its sale to pay costs of administration and other preferred claims. Once title to the property is vested in the heirs, even though it is subject to divestment by order of the probate court, the statutory exemption attaches and a subsequent sale, by order of the court, does not disqualify the heirs from asserting the protection of the exemption to defeat the claims of the general creditors.

An additional factor distinguishes *McIntyre* from *Fath, Muntz* and *Izedorio:* the relationship of the parties to the deceased homestead owner, a matter which the court dwells upon to some extent. In *Fath, Muntz* and *Izedorio* the courts dealt exclusively with the conflicting claims of the decedent's general creditors and the decedent's adult children, who would have taken as legal heirs in the absence of a devise of the property. Research has failed to uncover any California decision, prior to *McIntyre,* in which the courts have been forced to adjudicate the conflicting claims of the decedent's general creditors and those claiming the protection of the homestead exemption in section 1265 who were not the legal heirs of the deceased, or in the words of the *McIntyre* decision, who were "strangers" to the estate.

In respect to the narrow construction of the statute so as to bar the legatees from asserting the homestead exemption, the decision in *McIntyre* seems to be entirely consonant with prior court rulings on the breadth and liberality to be given exemptions from forced sale contained within the Homestead Act.[9] The court, quoting from an earlier decision,[10] noted:[11]

> The object of the homestead law is to protect the homesteader and those dependent upon him or her in the enjoyment of a domicile not exceeding $5000 [now $12,500]

[5] 189 Cal. App. 2d at 501, 11 Cal. Rptr. at 735.

[6] 132 Cal. 609, 64 Pac. 995 (1901).

[7] 69 Cal. App. 404, 231 Pac. 371 (1924).

[8] 100 Cal. App. 469, 280 Pac. 171 (1929).

[9] *In re* Miller, 27 F. Supp. 999 (S.D. Cal. 1939); Yager v. Yager, 7 Cal. 2d 213, 60 P.2d 422 (1936).

[10] Marelli v. Kealig, 208 Cal. 528, 531, 282 Pac. 793, 794 (1929).

[11] 189 Cal. App. 2d at 502, 11 Cal. Rptr. at 736.

> in value, and to this end a liberal construction of the laws and facts will be indulged by the court. When this object has been accomplished courts will not suffer this salutary statute to be used as a shield behind which those who would deal unjustly with creditors may find refuge.

Had the court stopped at that point in justifying its holding, the decision would probably present few future problems in California law. However, the court went on to add:[12]

> Clearly, the purpose [of the statute] is to protect *only* the homestead owner and his family. We have been referred to no case in which the protection, i.e., the homestead exemption, was extended upon the death of the homestead owner leaving no spouse or family, to favor strangers over general creditors. Such a construction is unreasonable and in the absence of compelling authority we decline to adopt it as against that which to us is the more reasonable interpretation.

If in making this statement the court was referring to the facts and problems of statutory construction in the case before it, i.e., a testamentary sale of homestead property, the proceeds to be given to "strangers," then the validity of its reasoning should not be challenged. Unfortunately, however, the statement is open to a much broader interpretation and might reasonably be construed as indicating that the homestead exemption is not available to devisees of homestead property when they are not, or would not be, the legal heirs of the devisor.

Without question the *McIntyre* decision would bar a stranger from asserting the homestead exemption in a case where he is to take only the proceeds of a testamentarily directed sale of the homestead property. But would the reasoning in the decision also apply where the stranger is to take, not as a legatee, but as a devisee of the homestead property under the owner's will? Although the likelihood of the court's assigning such an interpretation to the statement in future litigation is a matter of conjecture, it is submitted that such a position would find little logical support among available California authority.

In the first place, on its face, the statute makes no distinction between devisees who take as heirs and those who take as strangers to the estate. Homestead acts in other jurisdictions make such distinctions,[13] and limit the right of the homestead owner so that he may not devise to any person other than his heirs at law. Secondly, as has been previously mentioned, there is no California case on record dealing directly with this point in which the respective rights of the general creditors and strangers under a devise of homestead property have been adjudicated. Whether the absence of such litigation indicates an assumption on the part of California lawyers that an appeal from a lower court ruling favoring the rights of strangers to claim the protection of the statute would be fruitless in the light of the unambiguous phrasing of the exemption in section 1265, or whether such absence indicates an absolute lack of controversy over that question, is also a matter of conjecture. It is submitted, however, that the former reason seems most plausible in light of the multitude of cases which have dealt with other aspects of the Homestead Act.

Furthermore, in analogous situations the courts have frequently upheld the privilege of strangers to assert an exemption within the Homestead Act to defeat the claims of the owner's general creditors. It has been held in several California

[12] *Id.* at 502-03, 11 Cal. Rptr. at 735.

[13] *E.g.*, ILL. REV. STAT. ch. 52 § 2 (1961); NEV. REV. STAT. § 115.060 (1957).